IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

J U D G M E N T

Swaran Singh & others Vs State of Rajasthan
D.B.CRIMINAL APPEAL NO.8/2000

against the judgment dt.20.12.1999
passed by Additional Sessions Judge, Raisinghnagar,
in Sessions Case No.3/1999.

Date of Judgment: May 08, 2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE MANAK MOHTA

Mr.M.K.Garg)
Mr.Niranjan Singh) for appellants.

Mr.Vishnu Kachhwaha, Public Prosecutor.
Mr.T.R.Singh, for complainant.

REPORTABLE BY THE COURT:**(PER HON'BLE MR.MATHUR J.)**

1. This appeal is directed against the judgment dated 20.12.1999 passed by the learned Additional Sessions Judge, Raisinghnagar convicting appellant Kulwant Singh of the offence under section 302 IPC and sentencing to imprisonment for life and to pay a fine of Rs.5000/- and in

default, to further undergo one year's simple imprisonment. Appellants Swaran Singh and Kulvinder Kaur have been convicted of the offence u/s.302 with the add of Section 34 IPC and sentenced to imprisonment for life and to pay a fine of Rs.2000/- each and in default, to further undergo six months' simple imprisonment.

2. Before adverting to the evidence on record, we may notice that the accused persons and the prosecution witnesses belong to one and the same family; first appellant "A1" Swaran Singh being father, second appellant "A2" Kulwant Singh the younger brother and third appellant "A3" Smt.Kulvinder Kaur the sister-in-law (A2 Kulwant Singh's wife) of deceased Malkiyat Singh, while the star eye witnesses P.W.6 Bhupendra Kaur, P.W.7 Jasvinder Singh and P.W.10 Balbeer Kaur are the wife, elder brother & `Bhabhi' of deceased. They lived in a residential compound in separate apartments in Ward No.5 of Padampur town. While P.W.6 Bhupendra Kaur and her deceased husband Malkiyat Singh lived in one room, A2 Kulwant Singh lived in another with his family. A1 Swaran Singh lived with his younger son A2 Kulwant Singh. There is a common gate of the residential premises. It is alleged that there was a dispute in the family with respect to the partition of the compound area. The occurrence in question is alleged to have taken place in the intervening night of 1st and 2nd June, 1997 at about 12 in

the night. Malkiyat Singh returned to the house after watching a movie. While he was proceeding towards his room, he was interrupted by A1 Swaran Singh, A2 Kulwant Singh and his wife A3 Kulvinder Kaur. A1 Swaran Singh gave a lathi blow on his head. His cries attracted P.W.7 Jasvinder Singh and P.W.10 Balbeer Kaur and other neighbours. They got the deceased released from them. However, A1 Swaran Singh and A2 Kulvinder Kaur again caught hold of deceased Malkiyat Singh and A3 Kulwant Singh inflicted stab injuries on account of which he fell down and became unconscious. He was rushed to the hospital by P.W.7 Jasvinder Singh in his jeep, where he succumbed to the injuries. Promptly at 02.00 AM, a written F.I.R. of the incident was lodged by P.W.6 Bhupendra Kaur and P.W.7 Jasvinder Singh at the Police Station, Padampur. The police registered the crime for the offence under Section 302, 302/34 IPC and proceeded with investigation. The police inspected the site and prepared the inquest report. The autopsy on the dead body of Malkiyat Singh was conducted by P.W.4 Dr.Smt.Herbans Khanna and noticed the following injuries vide Ex.P.13:

> "1. Incised wound 2cm x 1cm x 1.5cm on left side of supra clavicle fossa;
>
> (2) Incised wound 2.2cm x 1cm x 1.5cm on left side of thigh in groin region."

In the opinion of the doctor, the cause of death was excessive haemorrhage due to cutting of large vessels leading to shock & death.

3. The police laid the chargesheet against the appellants for the offence under sections 302, 302/34 IPC. The appellants denied the charges levelled against them. During trial, the prosecution in support of the case adduced oral & documentary evidence. The trial Court found the prosecution case proved and, as such, convicted & sentenced the appellants in the manner noticed above.

4. We have heard learned counsel for the parties and perused the record. The prosecution examined P.W.1 Bhawani Shanker, P.W.3 Deewan Chand, P.W.6 Bhupendra Kaur, P.W.7 Jasvinder Singh and P.W.10 Balbeer Kaur as witnesses of occurrence.

5. Surprisingly the victim P.W.6 Bhupendra Kaur, wife of deceased Malkiyat Singh, took a `U' turn in the cross examination and denied the correctness of deposition she made in the examination-in-chief and, as such, she was declared hostile by the prosecution. The main thrust of contention of learned counsel for the appellant is that the entire case has been fabricated at the instance of elder brother P.W.7 Jasvinder Singh and `Bhabhi' P.W.10 Balbeer

Kaur. Thus, we proceed to scrutinize and analyze the evidence of the said witnesses of occurrence.

6. P.W.7 Jasvinder Singh is the son of A1 Swaran Singh and elder brother of deceased Malkiyat Singh. He deposed that at about 12 in the night, he rushed to the spot hearing distressed cries. Alongwith him, the neighbour P.W.1 Bhawani Shanker and others also reached. His younger brother Malkiyat Singh was thrown on the ground by A1 Swaran Singh, A2 Kulwant Singh and A3 Kulvinder Kaur. His father A1 Swaran Singh was thrashing his brother Malkiyat Singh by lathi. Malkiyat Singh was rescued by him and P.W.1 Bhawani Shanker. However, Malkiyat Singh was again caught hold by A1 Swaran Singh and A3 Kulvinder Kaur. A2 Kulwant Singh inflicted injuries by knife on the neck and other parts of the body of Malkiyat Singh. There was profuse bleeding from the injuries of Malkiyat Singh on account of which he fell down. He took him to the hospital in his jeep. He was accompanied by P.W.6 Bhupendra Kaur. The doctor declared Malkiyat Singh dead. The doctor informed the police through a messenger. Thereafter, he went alongwith P.W.6 Bhupendra Kaur to the Police Station and submitted a written report Ex.P.18. He also deposed that deceased Malkiyat Singh had raised demand for partition of the common compound. His father A1 Swaran Singh and brother A2 Kulwant Singh were not inclined to give his share to him.

A2 Kulwant Singh wanted to sell the entire land and purchase a truck. Nothing material has been brought out in the cross examination.

7. P.W.10 Balbeer Kaur is the wife of P.W.7 Jasvinder Singh. She deposed that all the family members lived in a common compound in different rooms. There was a dispute between the deceased and the appellants with respect to the partition of the compound. On the date of incident at about 12 in the night, she was attracted by the distressed cries from the house of A1 Swaran Singh. She alongwith her husband Jasvinder Singh rushed to the spot. Appellants were thrashing deceased Malkiyat Singh. He was rescued by her husband. She also intervened upon which her bangles were broken. P.W.1 Bhawani Shanker disarmed A1 Swaran Singh by snatching the lathi. A1 Swaran Singh and A3 Kulvinder Kaur caught hold of Malkiyat Singh and A2 Kulwant Singh inflicted knife injuries. One of the injuries was caused on the neck of deceased. Deceased Malkiyat Singh fell down and there was profuse bleeding. He was taken to the hospital by her husband Jasvinder Singh in the jeep. He was accompanied by P.W.6 Bhupendra Kaur. During inspection, the police collected the pieces of broken bangles vide Ex.P.7. The police also seized & sealed her bangle vide Ex.P.8. In the cross examination, she denied the suggestion that her husband got the plot of deceased Malkiyat Singh in

their favour. She also denied that a false case was fabricated by them with a view to grab the piece of land. Nothing substantial has been brought out in the cross examination.

8. P.W.3 Deewan Chand is the neighbour. He has deposed that hearing the cries at about 12 in the night, he rushed to the spot. He found that A1 Swaran Singh and A3 Kulvinder Kaur had caught hold of deceased and A2 Kulwant Singh inflicted knife injuries to deceased, on account of which he fell down. He was taken to the hospital by Jasvinder Singh. In the cross examination, he admitted that when he reached near the spot, Bhawani Shanker, Jasvinder Singh and his wife were already present there.

9. P.W.6 Bhupendra Kaur is the wife of deceased Malkiyat Singh. She lived in the Ward No.5 of Padampur town. She deposed that the compound where she used to live alongwith her deceased husband, was also shared by A2 Kulwant Singh, A1 Swaran Singh and A3 Kulvinder Kaur. She identified A1 Swaran Singh and A2 Kulwant Singh as her father-in-law and brother-in-law respectively. A3 Kulvinder Kaur was identified as sister-in-law, being wife of A2 Kulwant Singh. She also deposed that there was a dispute between her husband and accused appellants with respect to partition of the common compound. On the date of incident,

her husband returned at about 12 in the night after watching a movie. Before she could reach upto the gate, it was opened by A1 Swaran Singh, A2 Kulwant Singh and A3 Kulvinder Kaur. As soon as her husband entered into the house, A1 Swaran Singh inflicted a lathi blow on his head. It is alleged that her husband raised cries, which attracted P.W.7 Jasvinder Singh and other neighbours. Jasvinder Singh intervened and rescued her husband. However, her father-in-law A1 Swaran Singh caught hold of her husband and A3 Kulvinder Kaur passed-on a knife to her husband A2 Kulwant Singh and exhorted to kill Malkiyat Singh. A2 Kulwant Singh inflicted two knife injuries to her husband Malkiyat Singh, one on the neck and other on lower part of the abdomen. Having sustained the injuries, Malkiyat Singh fell down. He was taken to the hospital by her brother-in-law P.W.7 Jasvinder Singh. She also accompanied him to the hospital. Her husband Malkiyat Singh was declared dead. It is submitted that a written report Ex.P.18 was lodged at the Police Station. In the cross examination, she gave the details of her children. She is mother of five children; three daughters and two sons. In the cross examination on the same day, she denied the suggestion that on the date of incident, A2 Kulwant Singh was not at the residence and he had gone out as a truck driver. She also explained that on raising hue & cries, the accused persons did not return to their rooms. Her elder brother-in-law also arrived there. A2

Kulwant Singh abruptly stabbed knife, as such, there was no occasion for anybody to rescue him. She also stated that when A2 Kulwant Singh stabbed knife to her husband, she was standing at a distance of about one and half or two feet. She also stated that first F.I.R. Ex.P.18 was written by Baldev Singh, son of her elder brother in law, as per her dictation. She also stated that P.W.7 Jasvinder Singh put his signatures on the report Ex.P.18. The cross examination of the witness could not be concluded on 12.11.1997, as such, she was bound down to appear on the next day to complete the cross examination. She absented on 13.11.97, as such, she was summoned by issuing bailable warrant for 15.12.97. She did not appear on that day, as such, again a bailable warrant was issued for 16.12.97. On that day also, she did not appear and, therefore, warrant of arrest was issued to procure her presence and the case was posted for 19.1.98. She appeared in the witness box on 19.1.98 and the cross examination resumed. To the surprise of the prosecution, the witness took complete `U' turn and refused to have witnessed the incident. Not only this, she also stated that none had witnessed the incident. She pleaded complete ignorance as to the assailant of her husband Malkiyat Singh. On being confronted with her statement in examination-in-chief and earlier statement before the police, she stated that those statements were given under pressure and at the instance of elder brother-in-law P.W.7 Jasvinder Singh. It

was admitted that she was living with her elder brother-in-law Jasvinder Singh after the incident. She also stated that one plot in the name of her deceased husband Malkiyat Singh was got transferred in the name of wife of her elder brother in law P.W.7 Jasvinder Singh, which was the main cause of dispute between her late husband and Jasvinder Singh. The prosecution having found that the witness has resiled from the material statement she made during the examination-in-chief and she was not speaking the truth, felt it necessary to cross examine her to get the truth. Thus, she was declared hostile on the request of the prosecution. On cross examination by the prosecution, she stated that the statement made by her in the examination-in-chief was not true but the statement made by her in the cross examination, was the correct one. On being confronted with the material parts of her statement marked "A to B", "C to D", "E to F" & "G to H" of the examination-in-chief exhibited as Ex.P.21, she stated that the statement made by her was incorrect being given at the instance of her elder brother-in-law P.W.7 Jasvinder Singh.

10. While analyzing the evidence of P.W.6 Bhupendra Kaur, we are reminded of the caution given by the Apex Court in Zahira Habibulla H.Sheikh vs. State of Gujarat reported in (2004) 4 SCC 158 that **in a criminal case, the fate o the proceedings cannot always be left entirely in the**

hands of the parties, crimes being public wrongs in breach and violation of public rights and duties which affect the whole community as a community and are harmful to the society in general. Dealing with the fair trial, the Court further observed that it will not be correct to say that it is only the accused who must be fairly dealt with. The Court observed that it would be turning a Nelson's eye to the needs of the society at large and the victims or their family members and relatives. The Court found that if the witness who deposed one way earlier comes before the appellate court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case, accept it.

11. The case in hand is just other way round. P.W.6 Bhupendra Kaur who is the victim, having given the truthful statement in examination-in-chief, has been won-over in the cross examination. The Apex Court has noticed such a situation in Dahyabhai Chhaganbhai Thakker v. State of Gujarat reported in AIR 1964 SC 1563. The Court observed that -

> "**A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing Court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross objection, permit the person calling him as a witness to put questions to him which might be put in cross examination by the adverse party**."

12. It is well settled that the **mere fact that a witness is declared hostile by the party calling him and allowed to be cross examined, does not make him an unreliable witness so as to exclude his evidence from consideration altogether**. Reference may be made to Bhagwan Singh v. State of Haryana reported in (1976) 1 SCC 389.

13. Recently, the Apex Court in Ram Swaroop v. State of Rajasthan reported in 2005 SCC (Cri) 61 held that the evidence of a witness cannot be discarded merely because he is declared hostile. **However, the fact that a witness has resiled from the earlier statement made in the course of investigation puts the court on guard and cautions the Court against acceptance of such evidence without satisfactory corroboration**. As observed by the Apex Court, in another case in Rabindra Kumar Dey v. State of Orissa reported in 1976 SCC (Cri) 566, **the Court must make a distinction between an**

statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention.

14. The manner in which P.W.6 Bhupendra Kaur has taken `U' turn clearly indicates that she has been won over by the Defence. It must not be lost sight the hard fact that victim in the instant case is a widow of 32 years with five children living in the same house and the appellants are father-in-law, brother-in-law and sister-in-law. Obviously, she needs support and thus, there must be some compelling reasons for her to defend them. It appears that she has not been able to stand for long. She was firm to her earlier statement made to the police, while deposing in the court on 12.11.97. She has stood by her statement in the cross examination on the same day. It may be recapitulated that the case was adjourned to 13.11.97. It appears that she was not allowed to appear. Irrespective of the bailable warrants issued against her, she was made to remain absent on 15.11.97, 12.12.97 and ultimately when she was produced on 19.1.98, she was completely changed. The Defence has utilized this entire time to make her understand that it was not in her interest to depose an statement of fact, which may ruin the entire family. As far as the correctness of the statement as given out in examination-in-chief is concerned, it may be stated that the same is in the line of version of the incident

given in F.I.R. Ex.P.18 lodged within two hours of the incident. It may be stated that a `Salwar' and a jumper which she was wearing at the time of incident were seized vide Ex.P.9. They have been found to be blood stained as per the F.S.L.Report Ex.P.34. Thus, her presence at the time of incident is established. Thus, it is difficult to believe that she did not witness the incident. As far as the corroborative evidence is concerned, the statement made by her in the examination-in-chief attributing the role to appellant Kulwant Singh finds corroboration from the medical evidence and recovery of incriminating articles. The version also finds corroboration from the statement of P.W.7 Jasvinder Singh and P.W.10 Balbeer Kaur.

15. We have analyzed the statements of these two witnesses P.W.7 Jasvinder Singh and P.W.10 Balbeer Kaur. The presence of P.W.10 Balbeer Kaur is also established from the fact that four broken pieces of bangles were recovered from the spot vide Ex.P.7. The police seized the sample of bangles from Balbeer Kaur vide Ex.P.8. As per the F.S.L.Report Ex.P.35, the bangle pieces seized from the spot, is similar to the bangle pieces, taken as sample from Balbeer Kaur. Similarly, the presence of P.W.7 Jasvinder Singh is established from the fact that the police recovered his blood stained shirt vide Ex.P.10. As per the F.S.L.Report Ex.P.34, the open shirt is found to be stained with human

blood. The ocular evidence of P.W.7 Jasvinder Singh and P.W.10 Balbeer Kaur finds corroboration from the other two incriminating circumstances viz; recovery of blood stained knife and presence of human blood on the clothes which he was wearing at the time of incident. Appellant Kulwant Singh was arrested on 5.6.97 vide Ex.P.29. While in custody, in pursuance of the information given by him to P.W.14 Pratap Singh vide Ex.P.13, a blood stained knife was recovered vide Ex.P.14. The knife was sealed & packed on the spot. It was deposited in the Malkhana and sent to the F.S.L. We are not dealing with the link evidence as the same has not been challenged by the defence. As per the F.S.L.Report Ex.P.34, the knife has been found to be stained with human blood. Another incriminating circumstances is recovery of blood stained pant and shirt vide Ex.P.17 in pursuance of the information given vide Ex.P.34. As per the F.S.L.Report Ex.P.34, both the pant and shirt are stained with human blood. Appellant Kulwant Singh has failed to give any explanation as to the presence of human blood on his pant and shirt. Thus, irrespective of the fact that P.W.6 Bhupendra Kaur has obliged Kulwant Singh in the cross objection as indicated above, there is overwhelming evidence against him to hold that it was Kulwant Singh, who inflicted two stab injuries to deceased Malkiyat Singh, which resulted into his death.

16. As far as the appellant Swaran Singh is concerned, the part attributed to him is that he inflicted a lathi blow on the head of Malkiyat Singh. This statement does not find corroboration from the medical evidence inasmuch as there is no injury on the head of deceased Malkiyat Singh. A reading of statement of two witnesses P.W.7 Jasvinder Singh and P.W.10 Balbeer Kaur shows that they have not witnessed A1 Swaran Singh inflicting a lathi blow to deceased Malkiyat Singh. The statement of these two witnesses is only to the extent that on hearing cries of Malkiyat Singh, when they reached to the spot, they found A1 Swaran Singh, A2 Kulwant Singh and A3 Kulvinder Kaur indulged with Malkiyat Singh in oral altercation. P.W.6 Bhupendra Kaur has stated in the first cross objection that A2 Kulwant Singh abruptly took out a knife and stabbed her husband Malkiyat Singh and, as such, there was no chance to rescue him. This clearly shows that the A1 Swaran Singh and A3 Kulvinder Kaur did not share common intention with A2 Kulwant Singh. As against A3 Kulvinder Kaur, the only allegation is that she passed-on a knife to her husband and exhorted to kill Malkiyat Singh. It is well established that the evidence of exhortation is a weak type of evidence. On the basis of material on record, it cannot be concluded that A1 Swaran Singh and A3 Kulvinder Kaur shared common intention with A2 Kulwant Singh in committing murder of Malkiyat Singh. Thus, the learned trial

Judge has committed error in convicting A1 Swaran Singh and A3 Kulvinder Kaur for the offence u/s.302 with the add of Section 34 IPC.

17. Turning to A2 Kulwant Singh and the nature of offence, it is submitted by the learned counsel Mr.M.K.Garg that the incident had taken place all of a sudden in which a stab injury was caused to the deceased, as such, it cannot be said that A2 Kulwant Singh had any intention to commit murder of his brother Malkiyat Singh. Learned counsel has placed reliance on certain decisions of the Apex Court; (1) Kalinder Bharik v. State of H.P. Reported in 2000 SCC (Cri) 96; (2) Jagtar Singh v. State of Punjab reported in 1983 SCC (Cri) 459; & (3) Shankar alias Kallu v. State of Madhya Pradesh reported in 1979 SCC (Cri) 632.

18. On consideration of the material on record, we find that this is a case where death becomes consequence because of excessive bleeding. The incident appears to have taken place all of a sudden on a trivial issue. Thus, it cannot be said that A2 Kulwant Singh intended to cause a particular injury, which is shown to have caused death. There was no premeditation. There was no malice. Therefore, it is not a case which can be brought under any one of the four clauses under Section 300 IPC but it will remain only in the range of culpable homicide not amounting to murder

punishable under Section 304 part II IPC.

19. Consequently, the appeal is partly allowed. The conviction of A1 Swaran Singh & A3 Kulvinder Kaur of offence u/s.302/34 IPC is set aside. Both A1 & A3 are acquitted of the charge under Section 302/34 IPC. They are on bail. Their bail bonds stand discharged. However, the conviction of A2 Kulwant Singh is altered from offence u/s.302 IPC to Section 304 part II IPC. He is in jail since 1997 and, thus, he has remained in jail for about nine years. He is sentenced to the period already undergone. A2 Kulwant singh is in jail. He shall be released forthwith, if not required in any other case.

(MANAK MOHTA), J. **(N.N.MATHUR), J.**

RANKAWAT JK, PS